regarding "actual innocence" underscores the appropriateness of that result here.

Finally, review is warranted here because the decision below presents difficulties for States defending against actual innocence claims. If States are prevented from obtaining and presenting relevant evidence that may well refute a habeas petitioner's "innocence" claim, it will be difficult for courts to limit relief to the "truly deserving." State convictions may be undone, even when evidence exists that would have confirmed the petitioner's guilt. Such a result interferes with the finality of State court convictions, and the comity between the state and federal courts.

For these and other reasons, review should be granted.

## STATEMENT OF THE CASE

### A. Gregory Lott burglarized John McGrath's house, tied up the eighty-two-year-old McGrath and set him on fire, causing McGrath's eventual death.

In 1987, an Ohio court convicted Gregory Lott of aggravated murder. The court determined that he killed eighty-two-year-old John McGrath by pouring lamp oil over him and setting him on fire after tying him up, and that Lott did so during the course of burglarizing McGrath's house and robbing McGrath.

Based on their investigation, the police determined that Lott had entered McGrath's house in July 1986, robbed and burned McGrath, burglarized the home, and stolen McGrath's car. Police discovered Lott's involvement in the attack upon McGrath by a tip from Deidra Coleman, an eyewitness who saw a man waiting in a car and behaving suspiciously. The man Ms. Coleman saw waited in the car for several hours outside Coleman's neighbor's (Mrs. Turk's) house. Coleman saw the man enter the house, and he ran out a few minutes later carrying a bag of cash. Ms. Coleman

carefully observed the license plate of the car and the man driving it, and called the police. App. 115a–16a.

Police then went to McGrath's house, after tracing the car Coleman saw to McGrath. When no one responded, the police left the house. Police returned the following day, entered through an unsecured door, and found McGrath lying on the floor, badly burned, with putrefying wounds. The police took McGrath to the hospital. A piece of cord and some burned paper was lying next to him. *Id.* at 116a–17a. Shortly after he was taken to the hospital, McGrath described his assailant to police. In his statement to police, McGrath said that he had seen his attacker before, and that the man was about six feet tall, had a light black complexion, long straight hair, white-gray tennis shoes, and was wearing a cap without a bill. *Id.* at 117a, 155a. (Lott now claims that his trial counsel were not aware of McGrath's description. See Lott's Second Habeas Pet., Br. at 5.) McGrath died at the hospital eight days after giving his statement. App. 117a.

Later, Coleman, the eyewitness who had spotted McGrath's car, identified Lott from a photo array as the man she had seen in (McGrath's) car. Police saw Lott on July 30, and arrested him then. *Id.* at 111a. Police found light-colored tennis shoes in the trunk of Lott's car when Lott was arrested. *Id.* at 155a.

After the 1986 assault upon McGrath, police found Lott's fingerprints in McGrath's house, including on a church collection envelope that McGrath had received at most one month before the murder. Those fingerprints also matched fingerprints found in McGrath's house after his home was burglarized three years earlier, in 1983. (The burglar had not been identified in 1983.) A shoeprint at the scene of the crime was consistent with Lott's tennis shoes. An uncapped, partially-used bottle of lamp oil was found on McGrath's dresser, near where McGrath had been found. *Id.* at 117a–18a.

After Lott was apprehended, he confessed to Detective Hughey of the East Cleveland police. Lott admitted that he had burglarized the house, and had tied up McGrath. During this interview, Lott began crying, and said he did not mean to hurt McGrath. Lott told Detective Hughey that Lott did not remember setting McGrath on fire. *Id.* at 160a. Lott's confession was suppressed at trial, as Lott's counsel was not present during the detective's post-indictment interview with Lott. See *id.* at 161a; Suppression Hr'g Tr. 513, 661–62.

**B. A state court three-judge panel convicted Lott and sentenced him to death.**

Based on the fingerprints, physical evidence, and eyewitness testimony, a grand jury indicted Lott for aggravated murder. The indictment specified that Lott had committed the aggravated murder in the course of committing burglary and robbery—a capital offense under Ohio law. See Ohio Revised Code ("O.R.C.") §§ 2903.01 & 2929.02. The indictment further charged Lott with aggravated burglary, aggravated robbery, aggravated arson, and kidnapping. (The kidnapping charge was later dropped.)

Lott waived his right to a jury trial, and the trial proceeded before a three-judge panel. (Ohio law requires three-judge panels for bench trials involving a capital charge. See O.R.C. § 2929.03(C)(2)(b).) Lott did not testify at trial, but his attorneys argued that that there was insufficient evidence linking Lott to the crime, and suggested that McGrath may have accidentally set himself on fire. App. 159a. The prosecutor argued that Lott had brought lamp oil to McGrath's house and set him on fire with it, and that there was nothing in McGrath's house that used kerosene or lamp oil. Trial Tr. at 778. The prosecutor apparently had learned from a police investigator shortly before the trial that an oil-burning lamp had been found in pieces in McGrath's home after McGrath died. Lott's Second Habeas Pet., Ex. D. (Lott now claims that the prosecutor had not told his trial counsel

that an oil lamp had been found in McGrath's home.) At the end of the trial, the three-judge panel unanimously convicted Lott on all remaining counts of the indictment. After a separate sentencing hearing at which Lott presented mitigation evidence, the panel unanimously imposed the death penalty.

**C. Lott challenged his conviction on direct appeal, in state post-conviction proceedings, and federal habeas.**

The Ohio Court of Appeals and the Ohio Supreme Court affirmed Lott's conviction on direct appeal. The state Supreme Court concluded that:

> In this case, the prosecution proved beyond dispute the existence of certain highly probative circumstantial evidence. Lott was indisputably linked to the victim's home by Lott's unexplained possession of the victim's car, by Lott's fingerprints at two separate locations in McGrath's home, and by a shoeprint on the floor of the victim's house consistent with Lott's gym shoes. From these facts and from the other physical evidence of the scene established by the prosecution, there was sufficient probative evidence from which reasonable minds could conclude, as the trial panel did, that Lott robbed, set fire to and purposely killed McGrath, and burglarized his home.

App. 181a–82a.

Finding that the evidence of Lott's guilt was substantial, the court rejected all of Lott's challenges to his conviction. The court then independently reviewed the death sentence, and concluded, beyond a reasonable doubt, that the aggravating circumstance that the murder was committed during an aggravated robbery and aggravated burglary

outweighed any mitigating factors. App. 191a. Lott's petition for delayed reconsideration of his direct appeal, and first state post-conviction review petition, were denied. See *State v. Lott*, 1994 Ohio App. Lexis 4965 (Ohio. Ct. App. Nov. 3, 1994) (affirming denial of post-conviction review), appeal denied, 638 N.E.2d 1039 (Ohio 1994).

In 1991, while Lott's first state post-conviction petition was pending, his lawyer obtained police reports that included McGrath's descriptions of his assailant and indicated that police had found an oil lamp in McGrath's house. (Lott now contends that that information was not provided to his trial counsel during Lott's trial.) Lott's post-conviction counsel deliberately kept that information from the court in the post-conviction proceedings, allegedly because two "nationally recognized capital defense attorneys" gave him "general tactical advice" that it was "best to plead claims in state court in very general terms, not fact-intensive terms." See Lott Second Habeas Pet., Ex. E (Myers Aff. ¶ 6).

Lott then filed a federal habeas corpus petition in 1997, including a claim for failure to provide exculpatory evidence before Lott's trial. Lott cited, among other things, the failure to provide a police document containing the victim's description of his attacker, which document Lott's previous post-conviction counsel located in 1991. The district court rejected Lott's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), as procedurally defaulted, found that Lott could not demonstrate cause and prejudice for the default, and concluded that Lott's new evidence would not have affected the trial outcome in any event. *Lott v. Coyle*, No. 1:95-CV-2642 (N.D. Ohio, Op. and Order Mar. 31, 1999) at 56–61.

The Sixth Circuit affirmed the district court's order rejecting Lott's first federal habeas petition, concluding that Lott's *Brady* claim (based on the victim's identification and the oil lamp found in the victim's house) was procedurally

defaulted, and that Lott had not shown cause and prejudice for his default. In so holding, the Sixth Circuit opined:

> The vast majority of Lott's claims in the instant case are procedurally defaulted, and Lott has failed to establish cause and prejudice for default of those claims. He, then, is left to argue that our refusal to evaluate his procedurally defaulted claims would result in a manifest miscarriage of justice because he is actually innocent of the crimes of which he was convicted. See *Schlup v. Delo*, 513 U.S. 298, 314–15 . . . (1995). We are not persuaded that Lott has presented "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial," *id.* at 316, and thus cannot conclude that a manifest miscarriage of justice would result if we declined to review his procedurally defaulted claims.

App. 122a.

In the course of its discussion of Lott's actual innocence argument in his first habeas petition, the Sixth Circuit also addressed, in dicta, the possible effect of Lott's confession:

> Although the [trial] panel did not consider Lott's statement in convicting him, a habeas court may take it into account in evaluating his claim of miscarriage of justice due to actual innocence. (citations omitted) . . . A more detailed review of the circumstances than appears in this record may show that Lott's inculpatory statement, although suppressed at trial, was voluntarily made and admits of no reason to doubt its reliability or truthfulness. Though Lott said he did not recall setting the fire that burned McGrath, the State introduced evidence of Lott's fingerprints in the victim's home, his possession of the victim's car,

> and a shoeprint in McGrath's bedroom that generally matched Lott's shoes. Since this issue may now be pending in state court and has not been fully briefed before us, we reach no final conclusion regarding the effect of the confession.

See *id.* at 161a–62a.

While Lott's appeal of his first federal habeas was pending, Lott filed a second state post-conviction petition in 2000, again arguing that the prosecutor wrongly withheld exculpatory information at trial, namely, the victim's description of his attacker and the police report showing that an oil lamp was found in the victim's house. The trial court rejected those claims. Lott also argued on appeal that he was actually innocent. In 2002, after the Sixth Circuit had rejected Lott's first federal habeas case, the Ohio Court of Appeals rejected Lott's *Brady* and actual innocence claims, both on procedural grounds (failure to meet Ohio statutory standard for successive state post-conviction review petition, and res judicata), and on the merits. See *id.* at 96a–113a. The Ohio Supreme Court declined jurisdiction of Lott's appeal from the denial of his second state post-conviction review petition. *State v. Lott*, 773 N.E.2d 552 (Ohio 2002). In 2002, Lott also filed a motion in the Ohio Supreme Court to vacate his death sentence, based on *Atkins v. Virginia*, 536 U.S. 304 (2002), but the state courts concluded that Lott was not mentally retarded, so denied relief. See *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002); *State v. Lott*, Nos. CR-211002, CR-211261, CR-212720 (Ohio C.P. Ct. Findings of Fact and Conclusions of Law, Oct. 14, 2003).

**D. Lott filed a second federal habeas petition.**

Two weeks before his scheduled execution date in 2004, Lott applied to the Sixth Circuit for a stay of execution and for permission to file a second federal habeas petition to raise an actual innocence claim based on the claimed *Brady* violation. The Sixth Circuit concluded that the federal courts

could hear his *Brady* claim even though the Sixth Circuit had previously rejected it as procedurally barred, because the Ohio Court of Appeals had discussed Lott's *Brady* claim on the merits in its opinion denying Lott's second post-conviction relief petition. See App. 84a–86a. The Sixth Circuit authorized Lott to file his second petition, and stayed Lott's execution indefinitely. See App. 88a. Chief Judge Boggs dissented from the order granting Lott permission to file a second petition, given the Sixth Circuit's ruling rejecting his claims in his first petition, and Lott's admitted knowledge of the factual predicate for his claims well before he filed his first petition. App. 89a–91a; see also 28 U.S.C. § 2244(b)(2)(B)(i). Orders authorizing the filing of second habeas petitions are not appealable. See *id.* § 2244(b)(3)(E).

Lott's second federal habeas petition contains one ground for relief, "Gregory Lott is entitled to habeas relief because he is innocent." Lott's Second Habeas Pet., Br. at 1. Lott, in his second habeas petition, now *denied* that he had ever confessed his role in the crime to the police. *Id.* at 14. Lott contended that the only evidence that should be considered regarding his actual innocence claim is that which he asserts was wrongfully withheld under *Brady*, and not his confession to police, despite the Sixth Circuit's statement, in denying Lott's first habeas appeal, that Lott's confession should be considered in regard to any actual innocence claim. *Id.*; cf. App. 161a–62a.

### E. The district court granted in part the Warden's counsel's discovery request seeking information with which to defend against Lott's actual innocence claim.

To defend against Lott's actual innocence claim, the Warden sought discovery from Lott. Specifically, the Warden asked to depose Lott and his trial counsel regarding whether Lott had ever admitted to his trial counsel that he had committed the murder or that Lott had confessed his

involvement in the crime to Detective Hughey. The Warden also sought to learn from Lott's trial counsel whether (and when) they were aware of the victim's identification information that the prosecutor allegedly failed to provide at trial. Warden's Motion for Discovery, at 3. The Warden also sought information from Lott's former post-conviction counsel to establish why Lott did not raise the *Brady* claims based on the victim's identification, and based on the oil lamp found in the victim's house, in Lott's first state post-conviction or initially in the first federal habeas petition. *Id.*

The district court granted the Warden's discovery request in part, and denied it in part. The district court granted the Warden's request to depose Lott's trial counsel regarding his knowledge, during the original trial, of the identification information and the information about the oil lamp in McGrath's house, and regarding any admission by Lott about his confession to police or Lott's role in the murder. The district court held that by asserting his "actual innocence" claim—which requires an evaluation of "all of the evidence" relevant to his guilt—Lott had impliedly waived his attorney-client and work-product privileges as to information regarding that innocence. App. 38a–45a. The district court also granted in part the Warden's discovery request seeking Lott's former trial counsel's notes, but required that those documents be submitted to the trial court for *in camera* review to determine which of those materials should be provided to the Warden. *Id.* at 57a–58a. The trial court denied the request to depose former post-conviction counsel, except to find out the date on which they found out about the police reports containing the victim's description of his assailant, and why that information was not included in Lott's first post-conviction petition. *Id.* at 54a–57a.

Lott sought certification of an immediate interlocutory appeal of the district court's order under 28 U.S.C. § 1292, but the district court denied certification. App. 3a.

**F. The Sixth Circuit stayed discovery, and it granted a writ of mandamus against the district court with regard to the trial court's finding of an implied waiver of attorney-client and work-product privileges.**

Lott filed a mandamus petition against the district court's discovery order. The Sixth Circuit stayed that order pending its consideration of the merits. App. 67a. The Sixth Circuit then granted a writ of mandamus against the district court, concluding that the lower court had committed "clear error" by ruling that Lott had impliedly waived the attorney-client privilege, and holding that the harm to Lott, and to the privilege, from disclosure warranted mandamus relief. *Id.* at 1a–18a. (That ruling is limited to the district court's finding of implied waiver of the attorney-client and work-product privileges. *Id.* at 3a n.1.)

The Sixth Circuit panel majority rejected the argument that *Schlup*'s "all the evidence" mandate for actual innocence claims meant that Lott had impliedly waived the privilege based on *Schlup v. Delo*. The Sixth Circuit acknowledged that any statements Lott made to his attorney about his guilt or innocence would be "unquestionably relevant to the determination of whether or not he is innocent." *Id.* at 16a. The majority nevertheless concluded that *Schlup*'s "all the evidence" mandate ordered courts to set aside only the usual admissibility rules, not the privilege rules. *Id.* The Sixth Circuit majority remanded the case to the district court with directions to vacate the discovery order to the extent it was inconsistent with the appellate court's opinion. *Id.*

Chief Judge Boggs dissented. *Id.* at 19a. He asserted that Lott could not maintain the privilege while asserting his actual innocence claim. *Id.* Chief Judge Boggs observed that Lott's actual innocence claim is one of "'factual innocence, not mere legal insufficiency,'" citing *Bousley v. United States*, 523 U.S. 614, 623 (1998), which requires the district

court to determine "if in fact Lott committed the murder." App. 21a. Chief Judge Boggs further stated that the Court has commanded that such claims must be evaluated "in light of all the evidence," including evidence that was either excluded or unavailable at trial, and evidence alleged to be illegally admitted at trial. *Id.* at 22a. The dissenting judge thus concluded that an implied waiver of the attorney-client privilege was essential to achieving a just resolution of Lott's actual innocence claim. *Id.*

Chief Judge Boggs also noted that recognition of implied waiver in this unique context does no violence to the privilege in other areas of law. In his view, "[i]t frankly blinks at reality to believe that a criminal defendant will be less candid with his attorney because of his possible assertion of a claim that would likely only be raised after conviction, a full course of appeals in the state courts, post-conviction review in the state courts, and federal habeas review . . .[so] [t]he purposes of the privilege are not harmed by [a] ruling [impliedly waiving the privilege in this context]." *Id.* at 28a. Finally, Chief Judge Boggs observed that mandamus relief was unwarranted here, as any error in the district court's order could be readily corrected on appeal, by ruling the privileged matter inadmissible in Lott's case. *Id.* at 29a–33a.

For the reasons discussed below, the Warden now respectfully requests certiorari review of the Sixth Circuit's mandamus order.

## REASONS FOR GRANTING THE PETITION

**The decision below allows actual innocence claimants to hide what may be the most relevant evidence regarding those claims, in conflict with *Schlup*'s mandate to weigh "actual innocence" claims "in light of all the evidence."**

Review is needed regarding whether a habeas petitioner who claims "actual innocence" under this Court's precedents impliedly waives the attorney-client and work-product privileges regarding information that bears upon the issues raised in the "innocence" claim. While the circuits other than the Sixth have not yet addressed this issue, it nevertheless merits review now.

The Sixth Circuit's ruling effectively allows habeas petitioners who assert "actual innocence" claims to hide the evidence most relevant and crucial to proving—or disproving—their claims. In *Schlup v. Delo*, 513 U.S. 298 (1995), the Court directed habeas courts to consider "actual innocence" claims "in light of all the evidence," including that which is alleged to have been illegally obtained, with due regard to that evidence's reliability, *id.* at 328. In defending against such a claim, States must be permitted to test the reliability of the prisoner's newly-presented evidence and contentions by inquiring about documents or statements that support (or refute) them, including those of the prisoner and his former counsel. While the district court's discovery order permitted just that, the Sixth Circuit majority vacated the privilege-related aspects of that order through a writ of mandamus. The court held that the district court clearly erred in concluding that Lott's actual innocence claim impliedly waived the privilege as to the issues Lott raised in his claim. The Sixth Circuit's rule is at odds with this Court's mandate in *Schlup* to consider all the evidence regarding innocence. And the ruling below creates significant problems for States defending against such claims, which often are late-in-the-

game, last-ditch efforts to evade a state-court conviction and sentence.

1. The decision below effectively changes the rules of federal habeas review in a way that could lead to a significant increase in actual innocence claims. Cf. *Schlup*, 513 U.S. at 321 (actual innocence claims are to be "rare" and reserved for the "truly deserving"). Habeas petitioners are more likely to assert actual innocence claims as a routine litigation tactic if they know that they can do so while withholding relevant, but privileged, information from the State in pressing that claim. That result threatens to undermine the finality of State court convictions.

As the Court has often recognized, States have an important interest in the finality of their convictions and the integrity of their processes for review and challenge of those convictions. Finality of state court convictions serves the important State interest of deterring crime, "since the deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks." *Kuhlmann v. Wilson*, 477 U.S. 436, 452–53 (1986). Federal court decisions like the one below upset the comity between the federal and state systems by adding yet another layer of federal review, and potential second-guessing, of state court convictions.

2. The Sixth Circuit's ruling also is at odds with this Court's direction in *Schlup* that a court evaluating an actual innocence claim must consider the claim "in light of all the evidence" relevant to a prisoner's guilt or innocence, not just the evidence at trial. 513 U.S. at 327–28. Review of all the innocence-related evidence means that States may test the reliability of late-in-the-day assertions by habeas petitioners claiming actual innocence. An implied waiver of the claimant's attorney-client and work-product privileges by a habeas petitioner under these circumstances is required by

*Schlup*, as the dissent below concluded, App. 22a–23a, or waiver follows naturally from *Schlup*'s mandate to consider all the innocence-related evidence, regardless of the usual rules governing admissibility, 513 U.S. at 327–28, and this Court should say so.

*Schlup v. Delo* held that to avoid a procedural bar to consideration of the merits of a constitutional claim, a habeas petitioner may assert that he is "actually innocent" of the crime, and thus that his continued incarceration is a fundamental miscarriage of justice. 513 U.S. at 321 (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986) and *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986)). The Court in *Schlup* recognized that the "actual innocence" exception was reserved for the "extraordinary" case, 513 U.S. at 321, and requires the habeas petitioner to show that it is "more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327.[1]

In *Herrera v. Collins*, 506 U.S. 390 (1993), the petitioner asserted a "free-standing" actual innocence claim based on newly discovered evidence (i.e., a claim that execution of one who was actually innocent is unconstitutional even when that person has had a fair trial, rather than asserting actual innocence as a "gateway" to an otherwise-defaulted constitutional claim). The Court rejected Herrera's claim. The Court stated that even assuming that a free-standing actual innocence claim existed, the burden of

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[1] Claims asserted in a second habeas petition must now meet the standards of the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"). 28 U.S.C. § 2244(b). To permit filing of a second petition containing claims not presented in a prior petition, AEDPA requires, in addition to "due diligence" in discovering the basis of the claim, proof by clear and convincing evidence that no reasonable factfinder would have convicted the prisoner. See 28 U.S.C. § 2244(b)(2)(B)(i)–(ii); but cf. *Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) (not reaching issue of whether § 2244(b) replaced *Schlup*, as petitioner was entitled to relief under either standard).

proof of actual innocence "would necessarily be extraordinarily high," 506 U.S. at 417, and Herrera had fallen far short of meeting it. Compare *id.* at 404 ("[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."), with *id.* at 417 ("We may assume, for the sake of argument . . . that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim . . . [but] the threshold showing for such an assumed right would necessarily be extraordinarily high."). Thus, even *if* such a free-standing claim exists, which Ohio disputes, cf. 506 U.S. at 404, the necessary showing would be even higher than that required for a gateway claim under *Schlup*.

The high standard for proving an actual innocence claim is not surprising, as such claims provide an "extraordinary" means to overcome a final criminal conviction. *Schlup*, 513 U.S. at 321. Consequently, unlike the presumption of innocence that a criminal defendant enjoys before trial, Lott comes before the habeas court with at least a "strong," if not "conclusive," presumption of guilt. *Id.* at 326 n.42.

To meet this high standard, the Court in *Schlup* put aside usual evidence rules, such as the exclusionary rule. Consistent with that admonition, the actual-innocence claimant's attorney-client and work-product privileges also must yield to the extent that the privileged matters relate to the contentions in the actual innocence claim. Habeas petitioners generally retain attorney-client or work-product privileges in habeas litigation. See Fed. R. Evid. 1101(c). But Lott here asserted an "actual innocence" claim, invoking *Schlup*, and citing *Herrera*, thus subjecting his claims to the searching factual review and high standard of proof that a

showing of "factual innocence" requires. Cf. Lott's Traverse at 18 (citing *Schlup*), 40–41 (citing *Herrera*).[2]

However an "actual innocence" claim is cast,[3] the relevant inquiry for a habeas court evaluating actual innocence is one of "*factual* innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623–24 (emphasis added). "To be credible, such a claim requires [a] petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*,

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[2] Lott slaloms between *Schlup* and *Herrera* in characterizing the basis of his claim. Lott's Traverse at 41 ("Lott's actual innocence claim is not 'free standing' because it is tethered in part to a *Brady* violation . . . But [Lott's reliance in part on police documents] neither defines his claim as a *Brady* claim, nor fairly corrals his current claim into one that merely uses actual innocence as a gateway to gain a merits review of a free-standing *Brady* claim.") Later, he characterizes his claim as a "hybrid" actual innocence claim, urging that the question to be decided is "whether, in light of the evidence of innocence, would any reasonable fact-finder find [Lott] guilty," and suggesting that that question is different than whether he has proven that he is in fact innocent. Lott's Sur-Reply to Petitioner's Traverse, at 1–2. Not only is Lott wrong when he contends that some sort of "hybrid" *Schlup-Herrera* claim exists, the Court's cases on actual innocence require that "all the evidence" be considered, not just evidence of innocence. Cf. *Schlup*, 513 U.S. at 328.

As Chief Judge Boggs noted in his dissent to the Sixth Circuit's order allowing Lott to file a second habeas petition, the Sixth Circuit either had already addressed Lott's actual innocence claim based on withheld exculpatory evidence, in denying Lott's first habeas petition, *or* Lott's claim in his second petition failed to meet the standard in 28 U.S.C. § 2244(b)(2)(B) for a second petition. See App. 88a–94a. And as noted above, Ohio disagrees that a free-standing actual innocence claim under *Herrera*, above, or a "hybrid" *Schlup-Herrera* claim (as Lott describes it), exists. However, given the Sixth Circuit's order allowing Lott to file his second petition, Ohio must defend that against Lott's contentions regarding his "actual innocence" claim. Ohio sought the discovery below for that purpose.

[3] As noted above, Ohio disputes that a free-standing innocence claim, or a hybrid *Schlup-Herrera* actual innocence claim, exists. See above, at n. 2.

513 U.S. at 324. An actual innocence claim calls for review of "all the evidence," not just the evidence that a habeas petitioner puts forward to cast doubt on his guilt. "The habeas court must make its determination concerning the petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'" *Schlup*, 513 U.S. at 328 (citing Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970)). It is not enough for a habeas petitioner to dismiss inculpatory evidence as having been obtained illegally. Under *Schlup*, that evidence, with due regard for its reliability, or lack of it, must be considered. See *Kuhlmann*, 477 U.S. at 454 n.17 ("Thus, the question whether the habeas petitioner can make the requisite showing must be determined by reference to *all* probative evidence of guilt or innocence.") (emphasis in original).

After all, it would make no sense to allow habeas courts to revisit final state-court convictions based solely on the habeas petitioner's "best" evidence of his innocence. Instead, all of the relevant evidence must be considered—the petitioner's new evidence, the evidence at trial, and other evidence not admitted (or available) at trial that sheds light on the reliability of the habeas petitioner's new evidence and contentions. Where the State has obtained a final judgment of conviction and the habeas petitioner comes before the district court with a strong, if not conclusive, presumption of guilt, *Schlup*, 513 U.S. at 326 n.42, an inquiry into whether the habeas petitioner is nevertheless "factually innocent" requires no less than a full examination of *all* of the evidence relevant to the petitioner's guilt or innocence.

As the dissent below noted, "[w]hen both the court and the parties step 'through the looking glass' to consider a petitioner's actual innocence, they engage in an inquiry of a

fundamentally different kind . . . [and a] claim of actual innocence thus places unique demands on the attorney-client privilege, based on values that do not transfer to other areas of law." App. 27a. Thus, in this scenario, not only are the usual rules of admissibility put aside, but the claimant's privilege must yield as well, to the extent that otherwise privileged matters relate directly to contentions made to support the actual innocence claim.

An implied waiver of attorney-client and work-product privileges regarding matters related to an actual innocence claim comports with Rule 501 of the Federal Rules of Evidence, which authorizes federal courts to determine the scope of privilege "in the light of reason and experience."[1] The attorney-client privilege was designed to foster full and frank conversations between clients and their attorneys. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (describing purposes served by attorney-client privilege). An implied waiver of the privilege does not undermine the values that the privilege was designed to protect. As the dissent below noted, "[i]t frankly blinks at reality to believe that a criminal defendant will be less candid with his attorney because of his possible assertion of a claim that would likely only be raised after a conviction, a full course of appeals in the state courts, post-conviction review in the state courts, and federal habeas review." App. 28a. Implying waiver of the privilege under these circumstances does not interfere with the fundamental purposes served by the privilege.

The Court has long recognized that evidentiary privileges, even existing ones, are not to be expansively construed, "for they are in derogation of the search for the

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[1] An actual innocence claim is a federal-law claim brought in federal court, so the federal law of privilege applies. See Fed. R. Evid. 501. Thus, issues of implied waiver of privilege here are also determined by federal law. See, e.g., *Bittaker v. Woodford*, 331 F.3d 715, 726 (9th Cir. 2003) (when the court imposing an implied waiver of privilege is a federal court, the scope of waiver is a matter of federal law).

truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974); see also *United States v. Zolin*, 491 U.S. 554, 568–70 (1989) (permitting *in camera* review of documents alleged to come within the crime-fraud exception to attorney-client privilege); *United States v. Nobles*, 422 U.S. 225, 239–40 (1975) (finding waiver of work-product privilege regarding matters in investigator's testimony). It would be odd indeed if a privilege that undeniably impedes the search for the truth could be used as a roadblock to considering "all the evidence" relevant to a *Schlup* actual innocence claim—a claim that is "extraordinary" in federal habeas and in which previous limitations on evidence do not apply.

Additionally, the ruling below is at odds with the view that evidence obtained in violation of constitutionally-based trial protections may be considered in determining an actual innocence claim. See App. 25a–26a (Boggs, C.J., dissenting). The *Schlup* Court's approval of Judge Friendly's article concerning habeas relief based on claims of actual innocence shows that evidence seized in violation of the Fourth Amendment can and should be reviewed to determine actual innocence. See 513 U.S. at 328 n.46. A court has ruled that the self-incrimination privilege under the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1966), also gives way in the unique context of an actual innocence claim. See, e.g., *Bean v. Calderon*, 166 F.R.D. 452 (E.D. Cal. 1996) (allowing habeas petitioner asserting actual innocence claim to invoke Fifth Amendment privilege at his deposition, but stating that court would draw adverse inference from his having done so). Similarly, courts assessing a petitioner's actual innocence have considered questionable hearsay evidence—evidence that in other contexts presents Sixth Amendment Confrontation Clause problems. See, e.g., *Doe v. Menefee*, 391 F.3d 147, 162, 170 n.20 (2d Cir. 2004) (considering hearsay testimony to assess innocence claim under *Schlup*'s "all the evidence" mandate); cf. *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004). And here, the Sixth Circuit (in its

earlier opinion in this case) correctly opined that Lott's confession, which was suppressed at trial on Sixth Amendment grounds, was relevant to his actual innocence claim and must be considered in assessing that claim. App. 161a. The order below, by categorically denying an implied waiver of attorney-client and work-product privileges, is inconsistent with the understanding that evidence obtained in contravention of constitutionally-based trial protections such as Sixth Amendment and Fourth Amendment, should be considered in determining "actual innocence." That inconsistency is particularly apparent when one considers that courts have not fashioned a doctrine of "implied waiver" of constitutional rights, but often apply implied waiver to claims of privilege. Cf. *id.* at 26a (Boggs, C.J., dissenting).

3. The court's refusal to recognize implied waiver below also conflicts with implied waiver case law more generally. See, e.g., *United States v. Amlani*, 169 F.3d 1189, 1195–96 (9th Cir. 1999) (criminal defendant impliedly waived attorney-client privilege by claiming prosecutor disparaged his attorney, causing defendant to fire him and thereby interfering with defendant's right to counsel; information pertaining to defendant's substitution of counsel was vital to government's argument that its actions did not cause defendant to seek new counsel); *Minebea Co. v. Papst*, 355 F. Supp. 2d 518, 524–25 (D.D.C. 2005) (finding implied waiver based on party's assertion of justifiable reliance on opponent's misrepresentations); *United States v. Exxon Corp.*, 94 F.R.D. 246, 247–48 (D.D.C. 1981) (affirmative defense of good faith reliance on government regulations impliedly waived privilege regarding company's subjective intent in deciding how to comply with regulations).

Indeed, courts routinely find an implied waiver of the attorney-client and work-product privileges when a habeas petitioner contests his conviction on the ground that his counsel was ineffective at trial. See, e.g., *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003) ("It has long

been the rule in the federal courts that, when a habeas petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer."). While Lott insists that his claim here is not one of ineffective assistance of counsel, Lott's actual innocence claim affirmatively raised issues regarding the reliability of his confession and when his counsel learned of allegedly exculpatory information. Cf. Lott's Sur-Reply to Petitioner's Traverse at 1 ("Lott is not raising a claim of ineffective assistance of counsel.").

Here, Lott's verified habeas petition directly placed at issue his confession to police and his trial counsel's knowledge of exculpatory evidence. Lott's petition asserts his actual innocence, denies that he ever confessed to the police, and states that his trial counsel was unaware of the victim's identification of his assailant or the oil lamp found in the victim's home. See Lott's Second Habeas Pet., Br. at 1, 5, 7, 14–15. *Schlup* requires that actual innocence claims be evaluated "in light of all the evidence." 513 U.S. at 328. Accordingly, the district court properly concluded that Lott had impliedly waived the attorney-client and work-product privileges regarding those matters, and the Sixth Circuit's decision to the contrary muddies the implied waiver case law.

First, Lott has impliedly waived the privilege regarding his former post-conviction counsel's decision not to raise the *Brady* claims Lott presses now. Section 2244(b)(2)(B) requires him to show his "due diligence" in discovering the basis for his claim in a successive habeas petition.[5] Even though "ineffective assistance" of post-conviction counsel is

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[5] As noted above, the Warden has argued that Lott's actual innocence arguments regarding his *Brady* claim were addressed by the Sixth Circuit when that court denied Lott's first habeas petition, so under 28 U.S.C. § 2244(b)(1), Lott's second petition is not properly before the federal courts at all. See note 2, above. But the Warden must fully defend against Lott's second petition now that the Sixth Circuit authorized its filing.

not a cognizable habeas claim, see 28 U.S.C. § 2254(i), to be able to file a second petition at all, Lott must rely on his former post-conviction counsel's excuse for failing to raise these claims earlier.

Second, Lott has waived the privilege regarding his trial counsel's knowledge, or lack of knowledge, of exculpatory material Lott now invokes to support his claim. Surely the State is not required to accept at face value Lott's trial counsel's (Kersey's) affidavit asserting that the prosecutor did not tell Lott's counsel about this evidence during the trial. Cf. Lott's Second Motion for Rule 7 Record Expansion, Ex. L (Kersey Aff.). Indeed, by proffering an affidavit with his lawyer's testimony, Lott directly waived any attorney-client and work-product privileges, at least regarding the matters addressed in the affidavit. See *Hunt v. Blackburn* 128 U.S 464, 470–71 (1888); *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 615 (2d Cir. 1964) ("[T]he Cook affidavit purports to be based upon information received by Cook as Attorney for [the defendant] and in many respects parallels the allegations made in the answer and counterclaims. The district court properly held that under these circumstances the affidavit constituted a waiver by [the defendant] of the attorney-client privilege.") Additionally, Lott's trial counsel's notes are material to Lott's claim that his lawyers were not aware of this evidence at trial. Because all of these materials were directly put at issue by Lott's claims here, and are vital to the State's defense, Lott has waived any attorney-client and work-product privileges as to any notes and attorney-client communications relating to those matters, just as surely as if he had urged an "ineffective assistance of counsel" claim. Cf. *Bittaker*, 331 F.3d at 716 (federal courts recognize an implied waiver of the privilege when habeas petitioner raises an ineffective assistance of counsel claim); *Tennison v. City and County of San Francisco*, 226 F.R.D. 615, 622–23 (N.D. Cal. 2005) (civil rights plaintiff, whose case was based on contention that government withheld

exculpatory information that would have led to his acquittal, impliedly waived attorney-client and work-product privileges as to any exculpatory evidence that plaintiff or his attorney may have known about).

Finally, by raising his actual innocence claim and denying that he ever confessed, Lott also has placed at issue whether or not he confessed to his role in the murder. An implied waiver of privilege regarding attorney-client communications or work-product relating to this issue is warranted under this case law, especially given its centrality to the *Schlup*-mandated review of "all the evidence" related to his "factual" innocence. Cf. *Schlup*, 513 U.S. at 328.

4. The ruling below presents States defending against actual innocence claims with a difficult problem. Such claims often are brought many years after the conviction, when witness recollections may have dimmed. Cf. *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("When a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication.") (quotation marks omitted). For example, defending against an "innocence" claim regarding a long-ago crime may involve problems of weighing "cold" evidence against the claimant's "new" evidence. Cf. *Herrera*, 506 U.S. at 403–04.

This case presents a prime example of the difficulties States face in defending against these claims. Lott was convicted of capital murder and sentenced to death in 1987. In his second federal habeas petition in 2004, Lott denied that he ever confessed his role in the crime to a police officer in 1986. While Lott's confession was not used to convict him at trial, it is relevant and must be considered in regard to his "factual innocence" claim, as the Sixth Circuit recognized in its opinion denying Lott's first federal habeas petition. See App. 161a. But the Sixth Circuit's ruling categorically

rejecting an implied waiver of the privilege impedes the State in defending against Lott's present assertion that the confession was totally fabricated. Cf. Lott's Second Habeas Pet., Br at 14–15. The troubling prospect of a federal court determining that a habeas petitioner is "actually innocent" without having had the benefit of additional evidence, not admitted at trial, that nevertheless may confirm the petitioner's guilt, threatens the finality of state-court convictions and comity between the federal and state judicial systems.

* * *

A habeas petitioner asserting his "actual innocence" must prove his factual innocence in light of all the evidence. That claim, to the extent it even exists in the context in which Lott asserts it here, is an extraordinary one in which the habeas petitioner seeks to overturn an otherwise final state conviction on the basis that it is a "fundamental miscarriage of justice." Cf. *Schlup*, 513 U.S. at 324–25. That inquiry is unlike other legal proceedings, and "previous limitations on evidence do not apply." App. 22a (Boggs, C.J., dissenting). Fairness requires that the claimant's privilege must yield to the extent that the communications or work product materials are directly relevant to the petitioner's specific contentions in support of his actual innocence claim. The implied waiver issue presented here merits review now, even before other courts of appeals grapple with implied waiver of privileges in the "actual innocence" context, as the ruling below may well encourage actual innocence claims as a routine litigation tactic rather than a "rare" claim reserved for the "truly deserving." Cf. *Schlup*, 513 U.S. at 321.

An actual innocence claim "attempts to strike a balance between the interests in finality and comity, on the one hand, and individualized justice on the other." App. 29a (Boggs, C.J., dissenting). The Sixth Circuit's decision effectively

allows the privilege "to oppose finality and comity by prolonging the fair disposition of such claims and encouraging their proliferation." *Id.*

For all of these reasons, Ohio urges this Court to review this case, and to reverse the Sixth Circuit's decision below.

## CONCLUSION

For all of the above reasons, Ohio urges the Court to grant Ohio's petition and reverse and vacate the Sixth Circuit's decision issuing a writ of mandamus against the district court's discovery order.

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE*
State Solicitor
**Counsel of Record*
DIANE RICHARDS BREY
Deputy Solicitor
MICHAEL L. COLLYER
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner

January 27, 2006

Supreme Court, U.S.
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In the Supreme Court of the United States

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MARC HOUK, Warden,

*Petitioner,*

v.

GREGORY LOTT, *et al.*,

*Respondents.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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**APPENDIX**

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JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE*
State Solicitor
**Counsel of Record*
DIANE RICHARDS BREY
Deputy Solicitor
MICHAEL COLLYER
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioners

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# APPENDIX A

In re: GREGORY LOTT, Petitioner.

No. 05-3532

424 F.3d 446

United States Court of Appeals
for the Sixth Circuit

May 10, 2005, Submitted
September 9, 2005, Decided
September 9, 2005, Filed

Before: Boggs, Chief Judge; Merritt and Cole, Circuit Judges. Merritt, J., delivered the opinion of the court, in which Cole, J., joined. Boggs, C. J., delivered a separate dissenting opinion.

Merritt, Circuit Judge. Gregory Lott has petitioned this Court for mandamus relief from a discovery order in which the District Court "waived" his attorney-client privilege because he claims actual innocence. There is no case authority holding that a claim of actual innocence "waives" the attorney-client privilege or similar privileges such as the doctor-patient and priest-penitent privilege.

Lott was convicted and sentenced to death for the 1986 murder of John McGrath, an elderly resident of East Cleveland, Ohio. Lott is currently in the midst of litigating his second habeas corpus proceeding pursuant to this Court's authorization. *See In re Lott*, 366 F.3d 431, 434 (6th Cir. 2004). In this petition, Lott contends that the prosecutor in his original trial withheld vital exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). As set forth in our order

authorizing Lott's second petition, *Lott* has made a prima facie showing that the prosecutor in his original trial both withheld important evidence from the court and made statements to the court that were directly contradicted by the evidence withheld from the defendant. *Lott*, 366 F.3d at 433.

In order for Lott to succeed in this second application for habeas relief, he must establish that but for the constitutional errors during his trial, no reasonable factfinder would have found him guilty of the murder. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). Lott maintains that he is, in fact, innocent of the murder. To counter this claim of innocence, the warden seeks discovery of any evidence that might demonstrate Lott's guilt, including evidence of an alleged confession that was suppressed during the original criminal trial due to a Miranda violation.

The District Court ruled that through his assertion of actual innocence, Lott has "implicitly waived the attorney-client and work product privileges to the extent necessary for the Respondent to defend the actual innocence claim." *Lott v. Bradshaw*, 2005 U.S. Dist. Lexis 21227, No. 1:04-CV-822 (N.D. Ohio Mar. 29, 2005) (Order granting in part and denying in part Respondent's Motion for Discovery at 9-11). In accordance with this ruling, the District Court authorized the warden to depose and seek production of documents from Lott's trial counsel. Specifically, the Court ruled that Lott's trial counsel must provide any relevant information he has concerning whether Lott is guilty of the murder and whether Lott confessed the murder to the police.

On May 9, 2005, Lott filed a petition for mandamus with this Court and a motion to stay discovery pending the Court's consideration of his mandamus petition. This Court stayed the discovery proceedings on June 22, 2005. Having now received further briefings from the parties, a response by the District Court Judge, as well as numerous amicus briefs from

interested parties, and a response to the briefs from the State, we now turn to the merits of Lott's mandamus petition. The District Court's order constitutes a departure from existing law for which we find no precedent. It undermines the historically strong protections of the attorney-client privilege. n1 As the order places the privileged relationship between a client and his attorney in jeopardy, this Court will issue the writ.

n1 While our decision is couched in terms of the attorney-client privilege, it applies with equal force to the work product privilege. *See Upjohn Co. v. United States*, 449 U.S. 383, 400, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981); *Bittaker v. Woodford*, 331 F.3d 715, 722 n.6 (9th Cir. 2003).

I. Jurisdiction

Discovery orders are generally not considered final for purposes of 28 U.S.C. § 1291. Typically, review of such orders becomes available only when there is a final judgment in the case. Assuming that this court does not have jurisdiction to review the District Court's order under § 1291, we must determine if there is some other jurisdictional basis for us to conduct immediate review of the order. n2 Pursuant to 28 U.S.C. § 1292(b), a district judge may certify an order not otherwise appealable for interlocutory appeal when that order "involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation." Such interlocutory appeal, however, is unavailable in this case because the District Court refused to certify the issue for appeal. *Lott v. Bradshaw*, No. 1:04-CV-822 (N.D. Ohio Apr. 28, 2005) (Denial of Petitioner Lott's motion to certify for appeal the order granting respondent discovery). When there is extraordinary need for review of an order before final

judgment and the District Court has refused to certify the issue pursuant to § 1292(b), this Court has authority to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651. The All Writs Act authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651.

n2 It should be noted that some courts of appeals have found that orders compelling discovery over a claim of privilege are immediately appealable under the collateral order doctrine. *United States v. Philip Morris*, 354 U.S. App. D.C. 171, 314 F.3d 612, 617 (D.C. Cir. 2003); *In re Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir. 1997). This doctrine permits an appeal to lie if (1) the order from which the appellant appeals conclusively determines the disputed question; (2) the order resolves an important issue that is completely separate from the merits of the dispute; and (3) the order is effectively unreviewable on appeal from a final judgment. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949). While discovery orders such as the one at issue will satisfy most of the Cohen elements, there is some question as to whether the "importance" element of the second prong will be met in every appeal of a privilege issue. *See Johnson v. Jones*, 515 U.S. 304, 315, 132 L. Ed. 2d 238, 115 S. Ct. 2151 ("We of course decide appealability for categories of orders rather than individual orders. Thus, we do not now in each individual case engage in ad hoc balancing to decide the issues of appealability"). There is some question as to whether each and every privilege ruling by a district court necessitates appellate review. This is an area of the law where the use of discretion inherent in our mandamus jurisdiction is more appropriate. As the criteria for mandamus relief are clearly met and

> our jurisdiction under § 1651 is proper, we see no need to rule on whether or not the District Court's order is collateral.

Our Court has continually recognized that mandamus relief is an "extraordinary remedy" that should be utilized only infrequently. This extraordinary remedy is usually reserved for "questions of unusual importance necessary to the economical and efficient administration of justice," or "important issues of first impression." *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1061 (6th Cir. 1982). We have "embraced a multi-factor test for determining the propriety of mandamus." *In re Chimenti*, 79 F.3d 534, 539 (6th Cir. 1996) (citing *In re Bendectin Products Liability Litigation*, 749 F.2d 300, 304 (6th Cir. 1984)). When making such a determination, this Court will consider whether the following factors are met:

(1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired

(2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.

(3) The district court's order is clearly erroneous as a matter of law.

(4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.

(5) The district court's order raises new and important problems, or issues of law of first impression.

*Bendectin*, 749 F.2d at 304. We have never required that every element be met in order for mandamus to issue: "'Rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is

relevant or applicable." *Id.* (quoting *Bauman v. United States District Court*, 557 F.2d 650, 655 (9th Cir. 1977)). As such, the mandamus analysis "cannot be wholly reduced to formula." *Chimenti*, 79 F.3d at 539.

In this case, the first, second, third, and fifth factors all weigh heavily in favor of issuing mandamus. With regard to the first factor, our initial jurisdictional considerations make clear that Lott has no other readily-available means of relief from the discovery order. Mandamus must issue or his counsel will be obliged to obey the binding court order and disclose the privileged communications. Review of that decision will only become available after there is a final judgment. As to the fifth factor, whether an assertion of actual innocence effects an implied waiver of the attorney-client and work product privileges is plainly an issue of first impression in this Circuit, and apparently an issue of first impression in the federal courts. The remaining two factors of the mandamus analysis deserve more extensive examination.

The oldest of the privileges, the attorney-client privilege has been recognized since the reign of Queen Elizabeth. *See*, e.g., *Hartford v. Lee*, 21 Eng. Rep. 34 (Ch. 1577). And, as Wigmore notes, the privilege was virtually "unquestioned" even then. 8 J. Wigmore, Evidence § 2290, at 547 (3d ed. 1940). The attorney-client privilege encourages "'full and frank communication between attorneys and their clients and thereby promotes broader public interests in the observance of law and the administration of justice." *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 141 L. Ed. 2d 379, 118 S. Ct. 2081 (1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)). As we have previously noted, "the privilege encourages clients to make full disclosure to their lawyers, and "[a] fully informed lawyer can more effectively serve his client." *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998). It is not

hyperbole to suggest that the attorney-client privilege is a necessary foundation for the adversarial system of justice.

If we intend to serve the interests of justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to delineate the scope of the privilege in ways that are predictable and certain. "An uncertain privilege—or one which purports to be certain, but rests in widely varying applications by the courts—is little better than no privilege." *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) (quoting *In re von Bulow*, 828 F.2d 94, 100 (2d Cir. 1987)); *Swidler & Berlin*, 524 U.S. at 409 (recognizing the need to avoid "substantial uncertainty into the privilege's application"). When defining the contours of the attorney-client privilege, we are guided by "the principles of the common law . . . as interpreted by the courts . . . in the light of reason and experience." Fed. R. Evid. 501; *Swidler & Berlin*, 524 U.S. at 403.

We find mandamus is appropriate in this case because if the discovery order stands, the petitioner will be damaged in a way that cannot be corrected through the course of ordinary appeal. *Bendectin*, 749 F.2d at 304.

The inability to cure an unlawful piercing of the privilege through direct appeal has led numerous courts of appeals to regularly utilize mandamus when important interests such as privilege are at issue. "Writ review is rather frequently provided . . . because of the desire to protect against discovery of information that is claimed to be protected by the Constitution, privilege, or more general interests in privacy." 16 Charles Alan Wright et al., Federal Practice and Procedure § 3935.3, at 605-06 (2d ed. 1996 & supp. 2005) (emphasis added); *see id.* at n.6 (citing cases where mandamus was issued to review claims of privilege); *Hahnemann University Hospital v. Edgar*, 74 F.3d 456, 461

(3d Cir. 1996); *See also In re Regents of University of California*, 101 F.3d 1386, 1387 (Fed. Cir. 1996), cert. denied 520 U.S. 1193, 137 L. Ed. 2d 695, 117 S. Ct. 1484 (issuing mandamus to set aside discovery order where district court erroneously ordered discovery over claim of attorney-client privilege); *Chase Manhattan Bank, N.A. v. Turner & Newall*, PLC, 964 F.2d 159, 163 (2d Cir. 1992) (similar); *In re Bieter*, 16 F.3d 929, 931-33 (8th Cir. 1994) (similar). This Court has utilized the All Writs Act to alter a discovery order implicating the attorney-client privilege. *In re Perrigo*, 128 F.3d 430, 441 (1997) (altering a discovery order that would have required public disclosure of information protected by the attorney-client privilege).

These Courts have all found that forcing a party to disclose confidential communications and seek redress via direct appeal after the court has reached a final judgment is an inadequate remedy. In *Hahnemann*, the Court of Appeals for the Second Circuit held that the type of relief afforded by direct appeal is usually insufficient when a claim of privilege is made. 74 F.3d at 461 ("when a district court orders production of information over a litigant's claim of a privilege not to disclose, appeal after a final decision is an inadequate remedy . . . for compliance with the production orders complained of destroys the right sought to be protected.") (quoting *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 591 (3d Cir. 1984); *See* also *University of California*, 101 F.3d at 1387 ("an appeal after disclosure of the privileged communication is an inadequate remedy") (citation omitted). As has been noted in footnote 3, some courts have reached a similar conclusion under the collateral order doctrine, which requires a finding that an order be "effectively unreviewable" on appeal. *See*, e.g., *Ford Motor Co.*, 110 F.3d at 963 ("Once putatively protected material is disclosed, the very 'right sought to be protected' has been destroyed) (citation omitted).

It has been argued that mandamus is unnecessary as this Court could remedy any harm on direct appeal. *See In re Lott*, 139 Fed. Appx. 658, 2005 U.S. App. Lexis 12280, 2005 WL 1515367 at *6-*7 (6th Cir. Jun 22, 2005) (Boggs, C.J., dissenting). By this logic, if discovery proceeded and privileged material was both disclosed and admitted into evidence against Lott, this Court could find that the privileged material should not have been used against him and treat the admission just as we would any other evidentiary error. But as the Court of Appeals for the Second Circuit has noted, "a pertinent aspect of confidentiality will be lost, even though communications later deemed to be privileged will be inadmissible at trial." *Chase Manhattan Bank*, 964 F.2d at 165. The damage to the attorney-client relationship will have already been done by the disclosure itself. If we eat away at the privilege by expanding the fiction of "waiver" (which normally requires an intelligent and knowing relinquishment), pretty soon there will be little left of the privilege.

Privileged communications are not merely withheld from admission against the holder. Instead, the privilege operates to prevent the disclosure itself. In that way, privileges can be distinguished from other rules of admissibility:

[Some] rules of evidence that do not function as privileges . . . are justified on the ground that they foster some extrinsic policy; e.g., the rule barring evidence of subsequent repairs . . . . One may object to the introduction of evidence of subsequent repairs, but one may not legally refuse to disclose whether or not such repairs have been made.

23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5422, at 668 (1980 & supp. 2005). With privileged communications, in contrast, one may simply refuse to reveal the confidences communicated to an attorney. Mandatory disclosure of the communications is the